Supreme Court, U.S.
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No. 543

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

CHARLES D. STUART, et al.,
Appellants

v.

WILL WILSON, ATTORNEY GENERAL OF TEXAS,
AND
TEXAS STATE BOARD OF MEDICAL EXAMINERS,
AND
HENRY WADE, DISTRICT ATTORNEY OF DALLAS COUNTY, TEXAS
Appellees

MOTION TO AFFIRM OR DISMISS

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MOTION TO AFFIRM OR DISMISS

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the final judgment and decree of the Three Judge United States District Court for the Northern District of Texas, Dallas Division, be affirmed or that the appeal taken therefrom be dismissed on the grounds that the only questions presented are so unsubstantial as to not warrant further argument.

STATEMENT

This is a direct appeal from the final judgment and decree entered on July 23, 1962, by a specially constituted Three Judge District Court for the Northern District of Texas which dismissed Appellants' action "on the merits" after a full and complete hearing of all the evidence.

Appellants proceed assuming the questions presented here are *What is naturopathy* or *What should naturopaths be allowed to do in the State of Texas.* Such inquiry is not appropriate here. The true inquiry is what can the State of Texas constitutionally do to insure competency of those who would practice the healing arts in Texas? Legislative powers are to be tested, not the philosophy of naturopathy.

The Texas Medical Practice Act does not prohibit the practice of naturopathy by Appellants (as is done in some states). That Act merely prohibits practice of any of the healing arts by incompetent, ill-trained and uneducated practitioners, whether they are naturopaths, allopaths, osteopaths, homeopaths, eclectics or adherants to any other school of thought. Stripped of verbage, Appellants' action does not claim that the regulations imposed by the State of Texas are unreasonably related to their object, but their only complaint is that because of their lack of education and training they cannot meet those basic standards.

In this Motion, as in the entire record, in all statutes and court opinions of Texas Courts, the terms "medicine" or "medical" are used in the broad sense. The terms are not exclusive, but inclusive.

They do not designate the use of pharmaceutical products, members of the American Medical Association, or those who have M.D. degrees as distinguished from those holding other degrees.

For the convenience of this Court, a short narrative contextual history of this litigation is attached to this Motion as appendix "A."

STATUTES INVOLVED

The Texas Medical Practice Act consists of Chapter 6, Title 71, of the Revised Civil Statutes of Texas (Articles 4495-4512, Vernon's Civil Statutes of Texas); and Chapter 6, Title 12, Revised Penal Code of Texas (Articles 739-745, Vernon's Penal Code of Texas); all as amended by House Bill 254, Acts, 53rd Legislature of Texas, 1953, Chapter 426, page 102.

Also involved is Article XVI, Section 31 of the Constitution of Texas.

Selected portions of the above Statutes are reproduced in Appellants' Jurisdictional Statement, pages 27a to 38a. A narrative summary of the Statutes is contained in Appendix "B" attached hereto.

ARGUMENT IN SUPPORT OF MOTION

The judgment of the Three Judge District Court below is plainly correct and in accord with interpretations of the highest appellate court of the State of Texas. It is in accord with the consistent holdings of all Federal Courts on the issues involved. Further, the judgment is consistent with and supported by all of the testimony heard below. Not only did the

Appellants fail to meet their burden to support their allegations, but the Appellees affirmatively proved that the regulatory statute in question here is reasonable, wise, non-discriminatory, efficient and rather lenient.

The court below predicated its judgment on correct interpretations of the Texas Medical Practice Act. See: *DeHay v. State*, 254 S.W. 2d 513 (1952); *Schlichting v. Texas State Board of Medical Examiners*, 298 S.W. 2d 946 (error ref. n.r.e., S. Ct. of Tex.; Cert. Den. 355 U.S. 870, reh. den. 355 U.S. 920); *Kraley v. State*, 327 S.W. 2d 759 (Cert. Den. 361 U.S. 830, her. den. 361 U.S. 904); *Wilson v. State Board of Naturopathic Examiners*, 290 S.W. 2d 946 (Error Ref. n.r.e., S. Ct. of Tex., Cert. Den. 355 U.S. 870, reh. den. 355 U.S. 920). In the above cited cases, the Texas courts are consistent with the rulings of other states on related questions. See: *Davis v. Becker*, 207 S.W. 2d 343 (Appeal Dismissed, 333 U.S. 859); *Dantzler v. Callison*, 94 S.E. 2d 177 (Appeal Dismissed, 352 U.S. 939 for want of a substantial question). In the last two cases, the statutes affirmatively prohibited the practice of naturopathy rather than just regulating it as is done in Texas. Also see: *Beck v. Binks*, 165 S.W. 2d 292 (Sup. Ct. Illinois); *Missouri v. Errington*, 317 S.W. 2d 326 (Cert. Den. 359 U.S. 892); *Missouri, ex rel. Collet v. Scopel*, 316 S.W. 2d 515; *Lucas v. State*, 99 N.E. 2d 419; *Taylor v. Oklahoma*, 291 P. 2d 1033 (Appeal Dismissed, 352 U.S. 805).

The judgment of the court below closely follows the Federal precedents in point. The Texas Medical Practice Act is substantially unchanged from the

time it was first held to be a constitutional regulation by this Honorable Court in *Collins v. Texas*, 223 U.S. 288 (1912). Although Federal questions have been raised in some of the cases from Texas, this Honorable Court has constantly denied relief on any question concerning the Texas Medical Practice Act. Appellants can cite no case from this Honorable Court or from any other Federal Court in support of their premises. Indeed, every Federal case Appellants cite in the Jurisdictional Statement (of those having any remote connection with the issues involved here) directly refute Appellants' position, as only a few examples will illustrate. See: *Dent v. West Virginia*, 129 U.S. 114; *Douglas v. Noble*, 261 U.S. 165; *Graves v. Minnesota*, 272 U.S. 425. Furthermore, every point Appellants raise here was raised in a United States District Court in Maryland, under a State Statute basically the same as the Texas Act, and that Federal Court soundly rejected each point. See: *Hitchcock v. Collenberg*, 140 F. Supp. 894, (D. Maryland, 1956, Affirmed 353 U.S. 919)

Case authority, both state and Federal, supports the judgment of the court below. All of the valid testimony in the record supports the judgment. Without belaboring the record, suffice it to say that none of Appellants have ever even attempted to meet the requirements they now attack. None of the Appellants has any substantial schooling to qualify them to practice the healing arts. The record reflects that there is no accredited school of naturopathy in the United States. The record shows that diplomas and schooling claimed by Appellants, for the most part,

are from notorious diploma mills or from non-existent schools.

Each Appellant questioned admitted that the subject matter of the examination required by the Texas Medical Practice Act concerned matters one would need to know to practice any healing art, including naturopathy.

The most significant body of testimony in the record consists of admissions from Appellants that they desire to treat any and all sorts of human illnesses or conditions, physical or mental, by almost any means known to modern man. They would include treatment of arthritis, cancer, leukemia, Bright's disease, hardening of the arteries, tuberculosis, tumors, cataracts of the eye, high blood pressure, mental illnesses of all kinds, heart conditions, etc. Appellants also seek to perform such "minor surgery" as the radical removal of cancer from the female breast and plastic surgery.

Appellants accuse the State of Texas of having an unreasonable statutory regulation in requiring anyone who would embark on such a significant endeavor as treating the human body to have some small and basic understanding of the problems involved and to show a minimum educational background in such matters! There simply is no common sense, logic, good faith or legal justification for their claims, much less any substantial Federal question with which this Honorable Court should concern itself.

As a collateral matter, Appellants' attack as discriminatory Article XVI, Sec. 31 of the Constitution of Texas which prohibits the Texas Legislature from

giving any preference to —or discriminating against —any particular school or branch of the medical arts. It is difficult for Appellees to conceive of how a State Constitution non-discrimination provision, fairly and impartially interpreted and enforced, could be violative of the Federal Constitution which prohibits just such discrimination and preference. The Federal Constitution is a strange source and this Honorable Court is a strange forum from which to *seek* discrimination.

CONCLUSION

It is respectfully submitted that the Appellants failed to show in the court below that Appellees, by enforcing the Texas Medical Practice Act, or that the Medical Practice Act, violated any of their Constitutional rights or that any of the findings of fact or conclusions of law made by the court below are in error. Therefore, this Motion to Affirm or Dismiss should be granted and the costs of this appeal should be assessed against the Appellants.

WILL WILSON
Attorney General of Texas

SAM R. WILSON
Assistant Attorney General
of Texas

TOM I. MCFARLING
Special Assistant Attorney
General of Texas, of Counsel.

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I am one of the attorneys of record for Appellees in the above entitled cause and that I am a member of the Bar of the United States Supreme Court, and that I have served a copy of the above and foregoing Motion to Affirm or Dismiss on Mr. James L. McNees, Jr., 407 Davis Building, 1309 Main St., Dallas, Texas, by placing a copy of the Motion in the United States Mail, properly addressed and stamped, on this the 7 day of ~~November~~ December, 1962.

APPENDIX "A"

CONTEXTUAL HISTORY OF THIS LITIGATION

On February 16, 1961, one Dr. DeHay, a naturopathic physician in Dallas County, attended a woman during childbirth after giving extensive pre-natal care. Charges of illegal practice of medicine were filed. DeHay was convicted. At the trial, DeHay attempted to show, in defense, that he was a licensed naturopath, but the tender was rejected by the Court. Article 4590d, Vernon's Civil Statutes of Texas, The Texas Naturopathic Act, was then in full force and effect, and DeHay was licensed by the Board of Naturopathic Examiners to practice in Texas. The conviction was upheld by the Texas Court of Criminal Appeals in *DeHay v. State*, 254 S.W. 2d 513 (1952). That Court said:

> "Whether Appellant was or was not a licensed practitioner of naturopathy as provided by Chap. 480, Acts Regular Session of the 51st Legislature in 1949, and appearing as Art. 4590d, Vernon's R.C.S., *is immaterial* to any issue in the case. Furthermore, such act does not provide a defense to the instant accusation, for, by the express provisions of Sec. 18 of the act, a license to practice naturopathy does not authorize the practice of medicine thereunder.
>
> "The reference above made is not to be construed as a recognition of the validity of the naturopathy act. That question is not before us." (Emphasis added)

Generally, that represents the attitude of the Texas Courts on this question in both civil injunction suits and criminal prosecutions; in cases both before

the Naturopathic Act was held to be unconstitutional and after it was so held. Under the Medical Practice Act, it is immaterial whether the individual against whom the action is brought be an attorney, an architect, a naturopath, an engineer, a dentist, a contractor, or one in any other profession or business. The sole question in those cases has been: (1) did he commit the acts charged; (2) are the acts charged such as to be the "practice of medicine" as defined in Article 4510, Vernon's Civil Statutes of Texas; (3) if so, did such individual have a license issued by the Texas State Board of Medical Examiners?

After the DeHay conviction was upheld, the District Attorney of Bexar County requested an opinion of the then Attorney General of Texas, Mr. John Ben Sheppard, as to the constitutionality of the Naturopathic Act. The opinion, No. S-60 (1953), concluded that the act violated the Texas Constitution and was void. Thereafter, a vacancy occurred on the Naturopathic Board, but the Governor refused to fill it. The next session of the legislature refused to appropriate any money for the operation of the Board, and the Comptroller of Public Accounts refused to issue warrants from available funds of the Board. The State Auditor refused to audit the books. The Naturopathic Board tendered fees to the Comptroller who refused to accept them for deposit. In effect, no state agency or officer recognized the legal existence of the Board of Naturopathic Examiners, or of the Naturopathic Act.

The Naturopathic Board then brought suit in its own name against the then Attorney General, Mr. Sheppard, the Comptroller and the Governor, seek-

ing a declaratory judgment of the Naturopathic Act and sought mandatory relief. In the meantime, the Defendant, Will Wilson, became the Attorney General of Texas, and was substituted as a Defendant.

In *Wilson v. State Board of Naturopathic Examiners*, 298 S.W. 2d 946, (Civ. App. 1957; error ref. n.r.e., S. Ct. Tex.; cert. den., 355 U.S. 870, reh. den., 355 U.S. 920), the Supreme Court of Texas said that the sole question before them was the constitutionality of Article 4596j. The Texas Naturopathic Act. The Court said in part:

> "(1) It is obvious that the practice of medicine as defined by Art. 4510 supra, includes the practice of naturopathy as defined by the above statute." (Referring to the Texas Naturopathic Act.)
>
> "It is also obvious that the practice of naturopathy as so defined is the practice of medicine as statutorily defined but limited to certain means and excluding specific means.
>
> "(2) Thus it is evident that while the naturopathy statute affirmatively authorizes a limited practice of medicine, it also affirmatively denies that the statute will have such effect.
>
> "We are uncertain as to which legislative path we should follow. This uncertainty, in our opinion, spells the death of the statute.
>
> . . .
>
> "It is our opinion that the Naturopathy Act attempts to both grant and deny to those complying with its terms the privilege of practicing medicine as that term is defined by the statutes of this State. It is, therefore, impossible of in-

terpretation and enforcement and is wholly void."

Not only was the statute void for vagueness, but it also contravened Article XVI, Section 31 of the Constitution of Texas, because it granted to this "school" of thought (known as naturopathy) a preference over other "schools" of thought:

> "The differences between the requirements of the Medical Practice Act and those of the Naturopathic Act are apparent and substantial. It is equally apparent that the requirements of the Medical Act are more burdensome than those of the Naturopathic Act. It follows that an unconstitutional preference was attempted in favor of the latter school of medicine and that it is inoperative and void."

After the *Wilson* case became final, the Texas naturopaths still continued to practice without any type of valid license, just as some are practicing as this case is being heard. (See testimony of the plaintiff Hoyle, for example.)

In 1957, the Attorney General of Texas, together with many local prosecuting officials, filed civil injunction suits under The Texas Medical Practice Act against persons illegally engaged in the practice of medicine in Texas. Some of the Plaintiffs in this suit were included.

One such injunction suit was filed in Midland County against Henry Schlichting. In *Schlichting v. Texas State Board of Medical Examiners*, 158 Tex. 279, 310 S.W. 2d 557 (1958), the Supreme Court of Texas upheld the propriety of the injunctions as against Schlichting's allegation that the Texas Med-

ical Practice Act did not authorize the injunctions. Also, Schlichting urged that the injunctions and the Texas Medical Practice Act violated the Texas Constitution and the 14th Amendment to the Constitution of the United States, but the Supreme Court of Texas said:

> "We are cited to no decisions indicating the constitutional provisions in question to be violated by the injunction and hold that they are not."

The precise questions presented in the instant case were available for determination in the *Schlichting* case, but the naturopaths did not pursue their available remedies to have them ultimately determined.

Since the *Schlichting* case, many civil injunctions have been granted in state courts against the illegal practice of medicine by naturopathic physicians, but none have been appealed. Criminal charges have been filed against some naturopathic physicians for violation of the Texas Medical Practice Act. One of the Plaintiffs in this cause was convicted in Bexar County after this suit was filed, and his conviction was upheld by the Texas Court of Criminal Appeals. The Supreme Court of the United States refused certiorari, thereby lending an inference that there was no substantial deprivation of constitutional rights involved in the enforcement of the Texas Medical Practice Act as against those who were illegally practicing medicine. (*See: Keahey v. State*, (1959) 327 S.W. 759; (cert. den., 361 U.S. 830, reh. den., 361 U.S. 904.)

One other suit completes the context of litigation. In 1958, some of the Plaintiffs in this cause filed

Civil Action 7750 in the United States District Court for the Northern District of Texas, Dallas Division, against the Attorney General of Texas and the Texas State Board of Medical Examiners raising the same questions raised here. That suit was dismissed, without prejudice, by Judge Atwell on April 14, 1958, because ". . . the Court does not have jurisdiction over the parties or over the subject matter. . . ." No appeal was taken.

On March 6, 1959, this action was filed. After preliminary matters were disposed of, the specially convened Three-Judge District Court for the Northern District of Texas, on July 23, 1962, dismissed the cause on the merits after a full hearing.

APPENDIX "B"

STATE STATUTE INVOLVED

The Texas Medical Practice Act is substantially unchanged from the time it was first held to be constitutional in *Collins v. Texas*, 223 U.S. 288 (1912).

For the convenience of the Court, The Texas Medical Practice Act can be summarized as follows: an applicant for licensure must be over the age of twenty-one years and of good moral character; must have completed sixty semester hours of undergraduate schooling of a quality acceptable for transfer of credits to the University of Texas on a B.A. or B.S. degree; must be a graduate of a bona fide reputable medical school, (defined in Article 4501 as being a school maintaining a course of instruction of not less than four terms of eight months each, that gives instruction in the subjects of the examination required,

in the Act, with the necessary teaching force, and possess and utilize laboratories, equipment and facilities for proper instruction in all of "said subjects.") Such medical school need not be approved by the American Medical Association as is required in some other states, such as Maryland. The Texas State Board of Medical Examiners recognizes graduates of medical schools not on the A.M.A. approved list. (See testimony of Dr. Crabb and Dr. Denman.)

The Act requires the applicant for licensure to successfully complete an examination in anatomy, physiology, chemistry, surgery, obstetrics, pathology, bacteriology, histology, diagnosis, gynecology, hygiene, and medical jurisprudence.

The Act excludes from its purview certain persons: armed forces and federal government personnel in the performance of their official duties and who are not engaged in private practice in Texas; practice by certain licensed out-of-state practitioners who come into the state for consultation only; masseurs, optometrists, chiropodists, chiropractors, dentists, nurses, and certain religious practitioners. The latter seven of this group are excluded so long as they are properly licensed by their respective regulatory Boards, if any. Also, their practice must be strictly confined to their specific sphere of activity and to specified portions of the anatomy upon which they may work if there is no general treatment activity.

The Act defines the practice of medicine as follows:

> "Article 4510: Any person shall be regarded as practicing medicine within the meaning of this law:

"(1) Who shall publicly profess to be a physician or surgeon and shall diagnose, treat, or offer to treat, any disease or disorder, mental or physical, or any physical deformity or injury, by any system or method, or to effect cures thereof; (2) or who shall diagnose, treat or offer to treat any disease or disorder, mental or physical or any physical deformity or injury by any system or method and to effect cures thereof and charge therefor, directly or indirectly, money or other compensation; provided, however, that the provisions of this Article shall be construed with and in view of Article 740, Penal Code of Texas, and Article 4504, Revised Civil Statutes of Texas as contained in this Act."

The Act recognizes the different "schools" of medical thought, and carefully provides measures to insure that there will be no discrimination as between the different "schools." Article 4495, containing qualifications for the members of the Board, provides that to be eligible, the prospective member must have his diploma from ". . . a legal and reputable college of medicine *of the school to which said practitioner shall belong.*" (Emphasis added) Also, that Article provides ". . . no school shall have a majority representation on said board." Article 4504 provides: "Nothing in this chapter shall be construed so as to discriminate against any particular *school or system* of the medical practice. . . ." (Emphasis added)

This admonition against discrimination has been carried out by the Board as will be seen by examining the list of present members of the Board. The Board contains osteopathic, allopathic (or regular), eclectic, and homeopathic physicians. Should any naturopathic physician qualify under the Medical Practice Act,

he probably would have an almost automatic appointment to the Board so as to insure the broad representation envisioned by the Act.

The Act carefully provides measures to insure against discrimination in the enforcement of the Act and provides for full judicial review of actions of the Board. Also, the Texas Constitution provides that the legislature shall not discriminate between "schools" in any law passed. Article XVI, Section 31 of the Constitution of Texas provides:

> "The legislature may pass laws prescribing the qualifications of practitioners of medicine in this State, and to punish persons for malpractice; but *no preference* shall ever be given by law to any schools of medicine." (Emphasis added)